(2) Court, U.S.
FILED

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OFFICE OF THE CLERK

No.

In The

Supreme Court of The United States

DANIEL RICHARD VAUGHEN,
Petitioner

v.

THE FLORIDA BAR,
Respondent

On Petition For Certiorari To The
Florida Supreme Court

Appendix

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Appendix A
Decision To Be Reviewed

Supreme Court of Florida

Tuesday, January 6, 2004

Case No.: SC02-1147
Lower Tribunal No.: 2002-30,226(07C)

THE FLORIDA BAR vs. DANIEL RICHARD VAUGHEN

Complainant Respondent

The Court approves the referee's report and directs that respondent receive a public reprimand to be administered by the Board of Governors of The Florida Bar.

Respondent's Motion for Sanctions and Attorney's Fees is hereby denied.

Judgment is entered for The Florida Bar, 651 East Jefferson Street, Tallahassee, FL 32399-2300, for recovery of costs from Daniel Richard Vaughen in the amount of $2,817.42, for which sum let execution issue.

Not final until time expires to file motion for rehearing, and if filed, determined.

ANSTEAD, C.J. and WELLS, PARIENTE, LEWIS, QUINCE, CANTERO and BELL, JJ, concur.

A True Copy
Test:

S/Thomas D. Hall

(Seal)
SUPREME
COURT OF
THE STATE

Thomas D. Hall
Clerk, Supreme Court
dy

OF FLORIDA

Served:
HON. JAMES A. RUTH, JUDGE
MARIE HARTMAN
CHARLES CHOBEE EBBETS
JOHN ANTHONY BOGGS
ELIZABETH SIKORA CONAN
ANTHONY I. PROVITOLA
DANIEL RICHARD VAUGHEN

Appendix B
Referee's Final Report

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant, Case No. SC02-1147
[TFB Case No. 2002-30,226(07C)]

v.

DANIEL RICHARD VAUGHEN,

Respondent.
_____/

REPORT OF REFEREE

I. Summary of Proceedings: Pursuant to the undersigned being duly appointed as referee to conduct disciplinary proceedings herein according to the Rules Regulating The Florida Bar, a hearing was held, on March 12, 2003 and continued on March 20, 2003. The pleadings, notices, motions; orders, transcripts and exhibits, all of which are forwarded to The Supreme Court of Florida with this report, constitute the record in this case.

The following attorneys appeared as counsel for the parties:

For The Florida Bar - Elizabeth Sikora Conan

For The Respondent - Pro se

II. Findings of Fact as to Each Item of Misconduct of Which the Respondent Is Charged: After considering all the pleadings and evidence before me, pertinent portions of which are commented on below, I find:

1. On or about March 12, 1998, Illinois resident Helen Morton hired respondent to assist her in selling several vacant lots located in DeLeon Springs, Florida which were held in the name of her deceased husband, Russell Morton. Illinois attorney Keith Foster and Ms. Morton's son, Dennis Morton, communicated with respondent on Ms. Morton's behalf.

2. Ms. Morton paid respondent a $1,500 refundable retainer to begin work on the Florida matter. No representation agreement was signed at this time.

3. Respondent initiated a probate proceeding and filed a Petition for Administration signed under penalty of perjury on October 5, 1998 stating that no other domiciliary probate proceedings were pending, that the subject estate was exempt from federal estate taxes, and that the subject property was valued at $144,000. Ms. Morton was subsequently appointed personal representative of the estate.

4. In July 1999, respondent corresponded with Dennis Morton, recommending an appraisal after questions arose regarding differences in property valuation, requesting further asset information and discussing additional attorney fees. Respondent then obtained a signed contract for sale of the lots which were appraised at approximately $12,000 and ordered a title search from Attorney's Title Insurance Fund, Inc., which disclosed a title defect.

5. On or about September 30, 1999, respondent sent Mr. Foster a letter stating that Helen Morton, as personal representative, could be required to file a "quiet title" lawsuit to clear title to the lots. Respondent further stated he would require an additional $1,500 in legal fees to clear the title and. that Ms. Morton's legal fees could exceed $3,200. Respondent enclosed a fee contract for Ms. Morton's signature and requested additional attorney's fees and costs to proceed with the matter.

6. Rather than initiating another lawsuit and incurring the additional legal fees that respondent requested, Ms. Morton, through Mr. Foster and Dennis Morton, utilized the services of Coast to Coast Title Services, Inc. (hereinafter referred to as "Coast to Coast") to "insure over" the title problem. The title company also agreed to handle the real estate closing on Ms. Morton's behalf.

7. During the real estate closing on November 10, 1999, respondent refused to deliver to Coast to Coast the $1,000 escrow deposit he was holding in his trust account.

8. After Ms. Morton and Coast to Coast executed the sale of the lots without respondent's involvement, respondent continued to engage in conduct that was adverse to Ms. Morton's interests.

9. On November 12, 1999, respondent sent a facsimile to Coast to Coast, reiterating his refusal to release the $1,000 deposit from escrow absent direction from Ms. Morton or Mr. Foster and enclosing a copy of the title insurance binder from Attorney's Title Insurance Fund, Inc. disclosing the title defect. Although this information could have caused negative implications for his client, respondent informed

Coast to Coast that he wanted to be sure they were aware of the defects disclosed by the title search.

10. Thereafter, Ms. Morton became dissatisfied with respondent's representation and took steps to discharge him. In a letter dated November 22, 1999, Mr. Foster relayed the following message to respondent: "Mrs. Morton wants you to take no further action whatsoever on her behalf and no longer wants you to represent her in connection with the Estate of Russell Morton in Florida." Mr. Foster, on Ms. Morton's behalf, also asked respondent to provide a copy of the billing for the appraisal of the lots and an itemized bill for his services. The request to cease all work on Ms. Morton's behalf was reiterated in several correspondences.

11. Despite being discharged by his client, respondent continued to represent himself either as Ms. Morton's or the estate's attorney and continued to charge unauthorized legal fees as evidenced by admissions in respondent's correspondence to Mr. Foster in November 1999.

12. On or about July 28, 2000, respondent filed a Petition to Surcharge Personal Representative, demanding that Ms. Morton pay respondent at least $7,294.50 from the net property sale proceeds she had received as personal representative, for both fees earned and prospective fees that respondent estimated would be necessary to complete the estate's administration.

13. The court's order on respondent's petition to surcharge authorized respondent to file suit on behalf of the estate against Coast to Coast, if Ms. Morton did not return requested funds within ten days after entry of the court's order.

14. Although the court never authorized respondent to sue Ms. Morton, respondent filed a civil complaint against both Ms. Morton and Coast to Coast on February 5, 2001 when the funds were not returned. In the complaint, respondent alleged that Ms. Morton breached her fiduciary relationship with the estate by engaging in fraudulent conduct, suggesting Ms. Morton engaged in federal tax evasion and fraudulent misrepresentation of ancillary/domicilliary estate administration status in connection with the property sale, and allegedly causing unspecified damages in excess of $15,000.

15. Respondent accepted service of the complaint and summons on Ms. Morton's behalf then moved for default against Ms. Morton. The court clerk refused to enter this default.

16. On February 6, 2001, respondent filed a petition to remove Ms. Morton and substitute himself as personal representative, despite his pending civil complaint against Ms. Morton and despite the outstanding order on respondent's petition to surcharge for attorney fees.

17. After amending his civil complaint to name Ms. Morton individually, respondent moved for a default against Ms. Morton on two additional occasions. The clerk refused to enter the second default because summons was served out of state and it was not notarized. The third attempt for default resulted in an order of default entered against Ms. Morton on February 21, 2002, during the pendency of The Bar's proceedings.

III. Recommendations as to Whether the Respondent Should Be Found Guilty: As to each count of the complaint, I make the following recommendations: I recommend that respondent be found guilty of vio-

lating the following Rules Regulating The Florida Bar:

- 4-1.1 for failing to provide competent representation to a client;
- 4-1.2(a) for failing to abide by a client's decisions concerning the objectives of representation;
- 4-1.4 for failing to keep a client reasonably informed about the status of a matter and for failing to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation;
- 4-1.7(b) for representing a client when the lawyer's exercise of independent professional judgment in the representation of that client was materially limited by the lawyer's own interest;
- 4-1.8(b) for using information related to representation of a client to the disadvantage of the client;
- 4-1.9(b) for using information relating to the representation to the disadvantage of a former client;
- 4-1.16(a)(3) for representing a client after being discharged;
- 4-3.1 for bringing or defending a frivolous proceeding;
- 4-4.4 for using means, in representing a client, that have no substantial purpose other than to embarrass, delay, or burden a third person;
- 4-8.4(a) for violating or attempting to violate the Rules of Professional Conduct;

4-8.4(d) for engaging in conduct in connection with the practice of law that is prejudicial to the administration of justice.

IV. Rule Violations Found: 4-1.1; 4-1.2(a); 4-1.4; 4-1.7(b); 4-1.8(b); 4-1.9(b); 4-1.16(a)(3); 4-3.1; 4-4.4; 4-8.4(a); and 4-8.4(d)

V. Recommendation as to Disciplinary Measures to Be Applied: I recommend that respondent receive a public reprimand to be administered by appearance before the Board of Governors. In addition, respondent shall pay all disciplinary costs associated with this proceeding.

In reaching these disciplinary recommendations, I have considered The Florida Standards for Imposing Lawyer Sanctions, specifically standard 4.33, which calls for a public reprimand when a lawyer is negligent in determining whether the representation of a client may be materially affected, by the lawyer's own interests, or whether the representation will adversely affect another client, and causes injury or potential injury to a client; standard 6.13, which calls for a public reprimand when a lawyer is negligent either in determining whether statements or documents are false or in taking remedial action when material information is being withheld; standard 6.23, which calls for a public reprimand when a lawyer negligently fails to comply with a court order or rule, and causes little or no injury to a party, or causes little or no actual or potential interference with a legal proceeding; and standard 7.3, which calls for a public reprimand when a lawyer negligently engages in conduct that is a violation of a duty owed as a profes-

sional and causes injury or potential injury to a client, the public, or the legal system.

In aggravation, I have considered the existence of a dishonest or selfish motive [standard 9.22(b)], respondent's refusal to acknowledge the wrongful nature of his conduct [standard 9.22(g)], and respondent's substantial experience in the practice of law [standard 9.22(i)]. In mitigation, I have considered respondent's lack of a prior disciplinary history [standard 9.32(a)].

In reaching these disciplinary recommendations, I have also considered the following case law:
In The Florida Bar v. Winter, 505 So.2d 1,337 (Fla. 1987), an attorney received a public reprimand for suing clients where there was no fraud or gross imposition by the clients, for engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation, and for failing to zealously avoid fee controversies with clients.

In The Florida Bar v. Giant, 645 So.2d 962 (Fla. 1994), an attorney received a public reprimand for failing to abide by a client's decision regarding the objectives of representation. The attorney sent a letter to the Department of Health and Rehabilitative Services (HRS) requesting that her client be given custody of all four of her children, even though the client only sought custody of two of her children.

In The Florida Bar v. Rotstein, 835 So.2d 241 (Fla. 2002), an attorney was suspended, in part, for filing two motions to enforce settlements against his clients' interests without their knowledge or consent.

VI. Personal History and Past Disciplinary Record: After the finding of guilt and prior to recommending discipline to be recommended pursuant to Rule 3-7.6(k)(1)(D), I considered the following personal history and prior disciplinary record of the respondent, to wit:

Age: 61
Date admitted to Bar: November 23, 1964
Prior disciplinary convictions and disciplinary measures imposed therein: None

VII. Statement of Costs and Manner in. Which Costs Should be Taxed:
I find the following costs were reasonably incurred by The Florida Bar.

A.	Grievance Committee Level Costs	
I .	Bar Counsel Travel Costs	$62.16
B.	Referee Level Costs:	
	I . Court Reporter Costs	$ 367.50
	2. Bar Counsel Travel Costs	$ 496.06
C. Administrative Costs		$ 750.00
D. Miscellaneous (Costs:		
	1 . Investigator Costs	$ 504.80
	2. Copy Costs	$ 200.30
	3. Transcript Costs	$ 128.90
TOTAL ITEMIZED COSTS:		$2,510.16

It is apparent that other costs have or may be incurred. It is recommended that all such costs and expenses together with the foregoing itemized costs be charged to the respondent, and that interest at the statutory rate shall accrue and be payable beginning 30 days after the judgment in

this case becomes final unless a waiver is granted by the Board of Governors of The Florida Bar.

Dated this ___ day of ORDER ENTERED 2003.
MAR 2 4 2003
(s) JAMES A. RUTH
James At Ruth, Referee

Original to Supreme Court with Referee's original file.

Copies of this Report of Referee only to:

Elizabeth Sikora Canon , Bar Counsel, The Florida Bar, 1200 Edgewater Drive, Orlando, Florida, 32804-6314

Daniel Richard Vaughen, 1485 Periwinkle Drive, Deland, Florida, 32724-3043

John Anthony Boggs, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300

Appendix C
Decision Denying Rehearing

Supreme Court of Florida
Thursday, March 25, 2004

CASE NO.: SC02-1147
Lower Tribunal No.: 2002-30,226(07C)

THE FLORIDA BAR vs. DANIEL RICHARD VAUGHEN

Complainant Respondent

Respondent's Motion for Rehearing is hereby denied.

ANSTEAD, C.J., and WELLS, PARIENTE, LEWIS, QUINCE, CANTERO and BELL, JJ, concur.

A True Copy
Test:

S/Thomas D. Hall
Thomas D. Hall
Clerk, Supreme Court

(SEAL) SUPREME COURT OF THE STATE OF FLORIDA

dy
Served:
MARIE HARTMAN
CHARLES CHOBEE EBBETS
JOHN ANTHONY BOGGS
ELIZABETH SIKORA CONAN
ANTHONY I. PROVITOLA

DANIEL RICHARD VAUGHEN
HON. JAMES A. RUTH, JUDGE

Appendix D
Inquiry/Complaint Form

The Florida Bar
Inquiry/Complaint Form

RECEIVED
AUG 7 2001
THE FLORIDA BAR
ORLANDO

Please carefully review this inquiry/complaint form once you have included all information. Note that there is a requirement for you to execute the oath at the end of this form. False statements made in bad faith or with malice may subject you to civil or criminal liability. Further information may be found in the pamphlet "Complaint Against A Florida Lawyer."

Please thoroughly review the Bar's Pamphlet "Complaint Against a Florida Lawyer" BEFORE filling out this form!

Your Name: Helen Morton

Address: 5919 Suydan Road

City: Leland State: Illinois

Telephone: (815) 4599376
Zip Code: 60531
Social Security #: 353-40-8838

What is the name and address of the attorney that is the subject of this inquiry/ complaint?

Attorney's Name: Daniel R. Vaughen
Address: 1485 Periwinkle Drive
City: DeLand State: Florida
Telephone: (904) 734-8914
Zip Code: 32721

DESCRIBE YOUR COMPLAINT, PROVIDE DATES AND FACTS OF ALLEGED MISCONDUCT

(Use a separate sheet if necessary. **Do not write on the back of this form!** Must be typewritten or clearly printed.)
My husband died owning several lots in Florida that had very little value. I retained Mr. Vaughen to help me transfer those lots to an individual who wanted to buy them. The total value of the lots was only thought to be $10,000 - $15,000. My attorney in Illinois inquired whether there was a way (other than probate) to transfer the lots and was told that there was not. Accordingly, Mr. Vaughen initiated a probate proceeding after requesting a retainer. Difficulties arose during the probate, and ultimately, Mr. Vaughen wanted a substantial amount more from me for additional work which I questioned. The title company that was handling the transaction assisted me in getting the lots sold without the work Mr. Vaughen was insisting needed to be done. Mr. Vaughen became incensed and filed suit against me in the probate matter, accepted service on my behalf and effectively confessed a judgment against me. Mr. Vaughen has accused me of wrongdoing when, in fact, his incompetence and/or unethical behavior resulted in substantial expenses which I had to pay which could have been avoided.

Under penalty of perjury, I declare the foregoing facts are true, correct and complete.

S/ Helen Morton
Signature

August 3 – 2001
Date

RECEIVED
AUG 7 2001

RETURN TO THE FLORIDA BAR
DEPARTMENT OF LAWYER REGULATION

☐ Tampa Airport Marriott
Suite C-49
Tampa, FL 33607

☐ Cypress Financial Ctr.
5900 N. Andrews Ave.
Suite 835
Ft. Lauderdale, FL
33309

☐ Tallahassee Branch
650 Apalachee Pkwy.
Tallahassee, FL
32399-2300

☑ 1200 Edgewater
Dr.
Orlando, FL
32804-6314

☐ Rivergate
Plaza
Suite M-100
444 Brickell
Ave.
Miami, FL
33131

Appendix E.
Formal Bar Complaint

THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,
Complainant,

Case No.SC02-1147
[TFB No. 2002-30,226 (07C]

V.
DANIEL RICHARD VAUGHEN,
Respondent.
_____/

COMPLAINT

The Florida Bar, complainant, files this Complaint against Daniel Richard Vaughen, respondent, pursuant to the Rules Regulating The Florida Bar and alleges:

1. The respondent, Daniel Richard Vaughen, was and still is a member of The Florida Bar, subject to the jurisdiction of the Supreme Court of Florida and to the Rules Regulating The Florida Bar.

2. Respondent resided and practiced law in Volusia County, Florida at all times material.

3. On or about March 12, 1998, Illinois resident Helen Morton hired respondent to assist her in selling several vacant lots located in DeLeon Springs, Florida which were held in the name of her deceased husband, Russell Morton. Due to Ms. Morton's advanced age and lack of mobility, Illinois attorney Keith Foster communicated with respondent on Ms. Morton's behalf.

4. Ms. Morton paid respondent a $1,500 refundable retainer to begin work on the Florida matter.

5. Respondent subsequently initiated a probate proceeding, and on October 19, 1998, Ms. Morton was appointed personal representative of her deceased husband's Florida estate.

6. Approximately one year later, respondent obtained a signed contract for sale of the lots which were appraised at approximately $12,000. Respondent then ordered a title search from Attorney's Title Insurance Fund, Inc. The title search disclosed a minor defect dating back to 1960.

7. On or about September 30, 1999, respondent sent Mr. Foster a letter which stated that Helen Morton, as personal representative, could be required to file a "quiet title" lawsuit in order to clear title to the lots. Respondent further stated that it could take $1,500 in legal fees to clear the title and that Ms. Morton's legal fees could exceed $3,200. Respondent enclosed a fee contract for Ms. Morton's signature and demanded an additional $2,000 for attorney's fees and costs in order to proceed with the matter.

8. Rather than initiating an unnecessary lawsuit and incurring the additional legal fees that respondent requested, Ms. Morton, through Mr. Foster, utilized the services of the title company handling the transaction to "insure over" the minor title problem. The title company, Coast to Coast Title Services, Inc. (hereinafter referred to as "Coast to Coast"), also agreed to handle the real estate closing on Ms. Morton's behalf.

9: During the real estate closing on November 10, 1999, respondent refused to deliver to Coast to (Coast the $1,000 escrow deposit he was holding in his trust account.

10. After Ms. Morton and Coast to Coast executed the sale of the lots without his approval, respondent continued to engage in conduct that was adverse to his client's interests.

11. On November 12, 1999, respondent sent a facsimile to Coast to Coast, wherein he once again refused to release the $1,000 deposit from escrow. Respondent also sent Coast

to Coast a copy of the title insurance binder from Attorney's Title Insurance Fund, Inc. disclosing the title defect. Even though this information could have caused negative implications for his client, respondent informed Coast to Coast that he wanted to be sure they were aware of the defects disclosed by the title search.

12. Thereafter, Ms. Morton became dissatisfied with respondent's representation and took steps to discharge him. In a letter dated November 22, 1999, Mr. Foster relayed the following message to respondent: "Mrs. Morton wants you to take no further action whatsoever on her behalf and no longer wants you to represent her in connection with the Estate of Russell Morton in Florida." Mr. Foster, on Ms. Morton's behalf, also asked respondent to provide a copy of the billing for the appraisal of the lots and an itemized bill for his services.

13. Despite being discharged by his client, respondent continued to represent himself as Ms. Morton's attorney and began to charge her for unauthorized legal fees.

14. In addition, respondent initiated legal action against his client, Helen Morton, and misrepresented to the court that his client was Mr. Foster rather than Ms. Morton.

15. On or about July 28, 2000, respondent filed a Petition to Surcharge Personal Representative, demanding that Ms. Morton pay respondent a portion of the amount of the net sales proceeds she had received as personal representative. A hearing was held on this motion on December 20, 2000, and the court ordered Ms. Morton to return $7,294.50 to Florida. The court further authorized respondent to file suit on behalf of the estate against Coast to Coast, if Ms. Morton did not return said funds within ten days after entry of the court's order.

16. Although the court never authorized respondent to sue Ms. Morton, respondent filed a complaint against Ms. Morton and Coast to Coast on February 5, 2001. In said

complaint, respondent asked for return of the net proceeds of the sale of the lots and accused Ms. Morton and Coast to Coast of unsubstantiated, fraudulent conduct in connection with the real estate transaction. Respondent, who was still acting as Ms. Morton's attorney, accepted service of the complaint and summons on Ms. Morton's behalf.

17. On February 6, 2001, respondent filed a Petition to Remove Personal Representative and Substitute Petitioner as Personal Representative. Respondent volunteered to be appointed as personal representative of the estate, and the court appointed respondent personal representative on March 19, 2001.

18. After unsuccessfully attempting to collect additional legal fees, respondent moved for defaults against Coast to Coast and Helen Morton. As of this time, the court has refused to enter a default against Ms. Morton.

19. By reason of the foregoing, the respondent has violated the following Rules Regulating The Florida Bar: 4-1.1 for failing to provide competent representation to a client; 4-1.2(a) for failing to abide by a client's decisions concerning the objectives of representation; 4-1.4 for failing to keep a client reasonably informed about the status of a matter, for failing to comply with reasonable requests for information, and for failing to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation; 4-1.7(b) for representing a client when the lawyer's exercise of independent professional judgment in the representation of that client was materially limited by the lawyer's responsibilities to another client or to a third person or by the lawyer's own interest; 4-1.8(a) for entering into a business transaction with a client or knowingly acquiring an ownership, possessory, security, or other pecuniary interest adverse to a client; 4-1.8(b) for using information related to representation of a client to the disadvantage of the client; 4-1.8(i) for acquiring

a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client; 4-1.9(a) for representing another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of a former client; 4-1.9(b) for using information relating to the representation to the disadvantage of a former client; 4-1.14(a) for failing to maintain as far as reasonably possible a normal client-lawyer relationship with the client when a client's ability to make adequately considered decisions in connection with the representation is impaired; 4-1.16(a)(3) for representing a client after being discharged; 4-3.1 for bringing or defending a frivolous proceeding; 4-3.3(a)(1) for making a false statement of material fact or law to a tribunal; 4-4.1(a) for making a false statement of material fact or law to a third person; 4-4.4 for using means, in representing a client, that have no substantial purpose other than to embarrass, delay, or burden a third person or knowingly using methods of obtaining evidence that violate the legal rights of such a person; 4-8.4(a) for violating or attempting to violate the Rules of Professional Conduct; 4-8.4(c) for engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation; and 4-8.4(d) for engaging in conduct in connection with the practice of law that is prejudicial to the administration of justice.

WHEREFORE The Florida Bar prays respondent will be appropriately disciplined in accordance with the provisions of the Rules Regulating The Florida Bar as amended.

s/Marie Hartman
MARIE HARTMAN

Chair
Seventh Judicial Circuit
Grievance Committee "C"
Post Office Box 2451

s/ Elizabeth S. Conan
ELIZABETH SIKORA CONAN
Bar Counsel
The Florida Bar
1200 Edgewater Drive
Orlando, FL 32804-6314

Daytona Beach, Florida
32115-2451
(386) 671-8040
Attorney No. 298085

(407) 425-5424
Attorney No. 9628

Date: May 3, 2002

Date: May 7, 2002

s/J.A.Boggs
JOHN ANTHONY BOGGS
Staff Counsel
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300
(850) 561-5600
Attorney No. 253847

and

JOHN F. HARKNESS, JR.
Executive Director
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300
(850) 561-5600
Attorney No. 123390

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have served the original of the foregoing Complaint to the Clerk of the Supreme Court of Florida, Supreme Court Building, 500 S. Duval Street, Tallahassee, Florida, 32399-1927; a copy of the foregoing, by certified mail No. 7106 4575 1293 0486 1366, re-

turn receipt requested, on respondent, Daniel Richard Vaughen, 1485 Periwinkle Drive, Deland, Florida, 32724-3043; and a copy of the foregoing by first-class mail to Bar Counsel, The Florida Bar, 1200 Edgewater Drive, Orlando, Florida, 32804-6314, on this 17th day of May, 2002.

s/J.A.Boggs
JOHN ANTHONY BOGGS
Staff Counsel

NOTICE OF TRIAL COUNSEL

PLEASE TAKE NOTICE that the trial counsel in this matter is Elizabeth Sikora Conan, Branch Disciplinary Counsel, whose address and telephone number are 1200 Edgewater Drive, Orlando, Florida, 32804-6314, (407)425-5424. Respondent need not address pleadings, correspondence, etc. in this matter to anyone other than trial counsel and to Staff Counsel, The Florida Bar, 650 Apalachee Parkway. Tallahassee, Florida. 32399-2300.

MANDATORY ANSWER NOTICE

RULE 3-7.6(g)(2), RULES OF DISCIPLINE, EFFECTIVE JULY 1, 1993, PROVIDES THAT A RESPONDENT SHALL ANSWER. A COMPLAINT. THE RULE MAY BE FOUND AT PAGE 722 OF THE SEPTEMBER, 2001 FLORIDA BAR. JOURNAL.

Appendix F
Motion For Rehearing

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,	
Complainant,	
v.	Case No. SC02-1147
DANIEL RICHARD VAUGHEN	
Respondent,	

MOTION FOR REHEARING

Respondent moves for a rehearing of this Court's order, dated January 6, 2004, adopting the Report of The Referee, upon the ground that in these proceedings Respondent has been denied the due process of law guaranteed by the Florida and United States Constitutions.

This Court has "exclusive jurisdiction to regulate the admission of persons to the practice of law and the discipline of persons admitted." Art. V, §15, ***Fla. Const***. Along with that exclusive jurisdiction comes the responsibility to insure that attorneys admitted to the practice of law in Florida are afforded due process of law, and are treated and disciplined fairly and competently.

This Court has stated, in ***Fla. Bar Code Prof. Resp***. D.R. Rule 3-7.7, that "The Supreme Court of Florida shall review all reports and judgments of referees recommending . . public reprimand . . .". This Court has also stated that

"Petitions for review in disciplinary proceedings shall take precedence over all other civil causes in the Supreme Court of Florida."

It is impossible to believe that the judges of this Court read the petition for review and briefs in this case, and then adopted the Report of the Referee without commenting on any issue raised in the petition and briefs. The errors and due process violations identified therein are too numerous, too obvious, and too egregious to have escaped notice. For example:

It was a denial of due process for the grievance committee, no member of which had any experience in the fields of law out of which the complaint arose, to find probable cause to prosecute Respondent, without advice from any attorneys who were expert in the fields of law out of which the complaint arose, and without affording Respondent an opportunity to appear in person before them.

It was a denial of due process that neither Bar counsel, nor the assigned Referee had any experience, much less expertise, in the fields of law out of which the complaint arose.

It was a denial of due process for Respondent to be prosecuted over objection on a formal complaint that failed to give him notice of "the particular act or acts of conduct for which the attorney is sought to be disciplined," as required by ***Fla. Bar Code Prof. Resp.*** D.R. 3-7.6(g)(1)(B).

It was a denial of due process for the Referee to grant a Bar motion to "waive defenses," (a motion without foundation in the Rules of Civil Procedure), and then to rely upon that order, itself a nullity, to summarily deny Respondent's requests for discovery essential to the preparation of his defense. Neither that motion, nor the order granting it, made any reference to discovery.

It was a denial of due process that neither the Referee, nor this Court, upon petition for certiorari, compelled the

Bar to correct its evasive, incomplete, and false answers to requests for discovery, thus denying Respondent discovery essential to the preparation of his defense.

It was a denial of due process for the Referee to admit the Bar's *final argument* into *evidence*, over objection, and then to refuse to permit Respondent to respond to that final argument.

It was a denial of due process for the Referee to severely restrict Respondent's ability to respond to the Bar's introduction as a composite exhibit of a highly selective, one-sided, out-of-context stack of 72 documents.

It was a denial of due process for Respondent to be denied a fair hearing before an impartial Referee.

It was a denial of due process that the Respondent was found guilty *solely* on the basis of an unsworn and uncorroborated inquiry/complaint form, itself replete with speculation, hearsay, opinions, and conclusions. The Bar presented *no testimony whatsoever*, whether from the complaining witness, or from any other witness, expert or otherwise, in support of its allegations, or to corroborate the complainant's unsworn complaint. Respondent presented his own testimony, and supporting affidavits from witnesses, and from attorneys who are experts in the fields of law out of which the complaint arose, utterly refuting the allegations of the Bar's formal complaint.

It was a denial of due process when Respondent was found guilty of violating a *comment* to the Rules of Professional Conduct; a comment that was *written by the Florida Bar;* a comment that has no foundation in the law of Florida; a comment that is itself in conflict with the Bar's comments to another Rule of Professional Conduct.

It was a denial of due process for Respondent to be prosecuted and found guilty *notwithstanding the recommendation for dismissal of the prosecution by Bar trial counsel and her supervising regional staff counsel.* Bar trial counsel

admitted on the record that under the facts of this case, the Bar's Comment, for the violation of which Respondent was prosecuted, placed Respondent in the position where he was "damned if he did, and damned if he didn't."

It was a denial of due process when, in violation of the comment to Canon 3B7 of the Code of Judicial Conduct, the Referee accepted, printed, and signed, without alteration, a proposed Final Report of Referee prepared by Bar trial counsel, without affording Respondent the opportunity to prepare and present his own proposed Final Report of Referee.

It was a denial of due process that the Report of the Referee contained no finding that the Bar had presented "clear and convincing" evidence of Respondent's guilt. ***Compare:*** Referee Circuit Judge Brian Lambert, who on January 8, 2004, dismissed a ten count Florida Bar complaint against attorney Willie Gary and his partner Madison McClellan, on the ground that the Bar had failed to meet the required burden of proof of "clear and convincing evidence" against them.

It was a denial of due process that the Report of the Referee made no reference in his Report to *any* witness, affidavit, evidence or issue presented by the Respondent in his defense, despite this Court's express direction in ***Fla. Bar Code Prof. Resp.*** D.R. 3-7.6 that: "The referee's report should list and address each issue in the case . . . ".

It was a denial of due process for the Referee to render his recommendations on punishment, without affording Respondent an opportunity to present all of his evidence on mitigation.

It was a denial of due process for the Referee to recommend a public reprimand when Bar trial counsel expressly informed the Referee on the record, *in order to create a record of that fact*, that she was not personally recommending a public reprimand.

It was a denial of due process when the disciplinary procedure adopted by this Court, and applied to Respondent in this case, provided no judicial review of the Referee's report and recommendations; permitted no oral argument with respect to the errors in that report; and provided no appeal from this Court's decision approving that report.

This is not a trivial case. A public reprimand is not a trivial punishment. That a public reprimand will have a significant and permanent impact upon the Respondent is demonstrated by the following facts (all of which the Referee refused to hear or consider):

Respondent was a candidate for national public office in 2000, and again in 2002. A public reprimand for a violation of professional ethics will scuttle any future campaign by Respondent for public office.

Respondent is Clerk (titular head) of a regional body of a religious denomination (Quakers). A public reprimand of Respondent for a violation of professional ethics will embarrass that denomination and may require them to select new leadership.

Respondent is Chairman of the Board of a large regional community mental health agency. A public reprimand of Respondent for a violation of professional ethics will embarrass that agency, and may necessitate Respondent's resignation from its Board of Directors.

Respondent is, and for the past five years has been, a full-time instructor at the College of Business, School of Accounting, University of Central Florida; the second largest business school in the World. He teaches law and ethics to approximately 1,000 undergraduate students per semester. A public reprimand of the Respondent for a violation of professional ethics will have a profound impact upon his present and past students, and may lead to the non-renewal of his multi-year employment contract.

Respondent is the personal representative of the Estate of Russell Morton. That estate has a pending civil action to recover assets wrongfully removed from the State of Florida by the former personal representative, the complaining witness in this case. That estate is also potentially liable for filing a false tax return with the State of Florida, Department of Revenue. A finding of guilt in this case will require Respondent to resign as personal representative of the Estate, and to withdraw as counsel for the Estate in the pending civil action. As a result, the pending civil action will be dismissed for failure to prosecute, and the Estate will be administratively closed for lack of any personal representative.

Respondent is nearly 63 years of age. He has been in practice for almost 40 years. There is no record of any prior disciplinary action against him. A public reprimand of the Respondent for a violation of professional ethics will further impair his age-impaired employability as an attorney.

WHEREFORE, because of these numerous and egregious denials of due process, Respondent requests that this Court grant a rehearing in this cause, and thereafter reject the Referee's recommendations and dismiss this unfounded prosecution.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have served the original and seven copies of the foregoing Motion For Rehearing on the **Hon. Thomas D. Hall**, Clerk of the Supreme Court of Florida, Supreme Court Building, 500 S. Duval Street, Tallahassee, Florida, 32399-1927, by overnight delivery; and served a copy of the foregoing to **John Anthony Boggs**, Staff Counsel, The Florida Bar, 651 E. Jefferson Street, Tallahassee, Florida 32399-2300; and to **Elizabeth Sikora Conan**, Branch Disciplinary Counsel, at 1200 Edgewater Drive, Orlando, Florida, 32804-6314, by first class mail, this 19th day of January, 2004.

S/Daniel Richard Vaughen
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In Pro Persona
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Appendix G
Rules of Discipline

Rule 3-7.6, Rules of Discipline, Rules Regulating The Florida Bar: Procedures Before A Referee

(a) Referees . The chief justice shall have the power to appoint referees to try disciplinary cases and to delegate to a chief judge of a judicial circuit the power to appoint referees for duty in the chief judge's circuit. Such appointees shall ordinarily be active county or circuit judges, but the chief justice may appoint retired judges.

(b) Trial by Referee . When a finding has been made by a grievance committee or by the board that there is cause to believe that a member of The Florida Bar is guilty of misconduct justifying disciplinary action, and the formal complaint based on such finding of probable cause has been assigned by the chief justice for trial before a referee, the proceeding thereafter shall be an adversary proceeding that shall be conducted as hereinafter set forth.

(c) Venue . The trial shall be held in the county in which an alleged offense occurred or in the county where the respondent resides or practices law or last practiced law in Florida, whichever shall be designated by the Supreme Court of Florida; provided, however, that if the respondent is not a resident of Florida and if the alleged offense is not committed in Florida, the trial shall be held in a county designated by the chief justice.

(d) Style of Proceedings . All proceedings instituted by The Florida Bar shall be styled "The Florida Bar, Complainant, v. (name of respondent), Respondent," and "In The Supreme Court of Florida (Before a Referee)."

(e) Nature of Proceedings .

(1) Administrative in Character. A disciplinary proceeding is neither civil nor criminal but is a quasi-judicial administrative proceeding. The Florida Rules of Civil Procedure apply except as otherwise provided in this rule.

(2) Discovery. Discovery shall be available to the parties in accordance with the Florida Rules of Civil Procedure.

(f) Bar Counsel . Bar counsel shall make such investigation as is necessary and shall prepare and prosecute with utmost diligence any case assigned.

(g) Pleadings . Pleadings may be informal and shall comply with the following requirements:

(1) Complaint; Consolidation and Severance.

(A) Filing. The complaint shall be filed in the Supreme Court of Florida.

(B) Content. The complaint shall set forth the particular act or acts of conduct for which the attorney is sought to be disciplined.

(C) Joinder of Charges and Respondents; Severance. A complaint may embrace any number of charges against 1 or more respondents, and charges may be against any 1 or any number of respondents; but a severance may be granted by the referee when the ends of justice require it.

(2) Answer and Motion. The respondent shall answer the complaint and, as a part thereof or by separate motion, may

challenge only the sufficiency of the complaint and the jurisdiction of the forum. All other defenses shall be incorporated in the respondent's answer. The answer may invoke any proper privilege, immunity, or disability available to the respondent. All pleadings of the respondent must be filed within 20 days of service of a copy of the complaint.

(3) Reply. If the respondent's answer shall contain any new matter or affirmative defense, a reply thereto may be filed within 10 days of the date of service of a copy upon bar counsel, but failure to file such a reply shall not prejudice The Florida Bar. All affirmative allegations in the respondent's answer shall be considered as denied by The Florida Bar.

(4) Disposition of Motions. Hearings upon motions may be deferred until the final hearing, and, whenever heard, rulings thereon may be reserved until termination of the final hearing.

(5) Filing and Service of Pleadings.

(A) Prior to Appointment of Referee. Any pleadings filed in a case prior to appointment of a referee shall be filed with the Supreme Court of Florida and shall bear a certificate of service showing parties upon whom service of copies has been made. On appointment of referee, the Supreme Court of Florida shall notify the parties of such appointment and forward all pleadings filed with the court to the referee for action.

(B) After Appointment of Referee. All pleadings, motions, notices, and orders filed after appointment of a referee shall be filed with the referee and shall bear a certificate of service showing service of a copy on staff counsel and bar counsel

of The Florida Bar and on all interested parties to the proceedings.

(6) Amendment. Pleadings may be amended by order of the referee, and a reasonable time shall be given within which to respond thereto.

(7) Expediting the Trial. If it shall be made to appear that the date of final hearing should be expedited in the public interest, the referee may, in the referee's discretion, shorten the time for filing pleadings and the notice requirements as provided in this rule.

(8) Disqualification of Referee. Upon motion of either party, a referee may be disqualified from service in the same manner and to the same extent that a trial judge may be disqualified under existing law from acting in a judicial capacity. In the event of disqualification, the chief justice shall appoint a successor.

(h) Notice of Final Hearing . The cause may be set down for trial by either party or the referee upon not less than 10 days' notice. The trial shall be held as soon as possible following the expiration of 10 days from the filing of the respondent's answer, or if no answer is filed, then from the date when such answer is due.

(i) The Respondent . Unless the respondent claims a privilege or right properly available under applicable federal or state law, the respondent may be called as a witness by The Florida Bar to make specific and complete disclosure of all matters material to the issues. When the respondent is subpoenaed to appear and give testimony or to produce books, papers, or documents and refuses to answer or to produce such books, papers, or documents, or, having been duly

sworn to testify, refuses to answer any proper question, the respondent may be cited for contempt of the court.

(j) Complaining Witness . The complaining witness is not a party to the disciplinary proceeding, and shall have no rights other than those of any other witness. However, unless it is found to be impractical due to unreasonable delay or other good cause, and after the complaining witness has testified during the case in chief, the referee may grant the complaining witness the right to be present at any hearing when the respondent is also present. A complaining witness may be called upon to testify and produce evidence as any other witness. Neither unwillingness nor neglect of the complaining witness to cooperate, nor settlement, compromise, or restitution will excuse failure to complete any trial. The complaining witness shall have no right to appeal.

(k) Referee's Report .

(1) Contents of Report. Within 30 days after the conclusion of a trial before a referee or 10 days after the referee receives the transcripts of all hearings, whichever is later, or within such extended period of time as may be allowed by the chief justice for good cause shown, the referee shall make a report and enter it as part of the record, but failure to enter the report in the time prescribed shall not deprive the referee of jurisdiction. The referee's report shall include:

(A) a finding of fact as to each item of misconduct of which the respondent is charged, which findings of fact shall enjoy the same presumption of correctness as the judgment of the trier of fact in a civil proceeding;

(B) recommendations as to whether the respondent should be found guilty of misconduct justifying disciplinary measures;

(C) recommendations as to the disciplinary measures to be applied;

(D) a statement of any past disciplinary measures as to the respondent that are on record with the executive director of The Florida Bar or that otherwise become known to the referee through evidence properly admitted by the referee during the course of the proceedings (after a finding of guilt, all evidence of prior disciplinary measures may be offered by bar counsel subject to appropriate objection or explanation by respondent); and

(E) a statement of costs incurred and recommendations as to the manner in which such costs should be taxed.

(2) Filing. The referee's report and record of proceedings shall in all cases be transmitted together to the Supreme Court of Florida. Copies of the report shall be served on the parties including staff counsel. The referee shall serve a copy of the record on bar counsel with the report. Bar counsel will make a copy of the record, as furnished, available to other parties on request and payment of the actual costs of reproduction.

(l) The Record .

(1) Recording of Testimony. All hearings at which testimony is presented shall be attended by a court reporter who shall record all testimony. Transcripts of such testimony are not required to be filed in the matter, unless requested by a party, who shall pay the cost of transcription directly, or ordered by

the referee, in which case the costs thereof are subject to assessment as elsewhere provided in these rules.

(2) Contents. The record shall include all items properly filed in the cause including pleadings, recorded testimony, if transcribed, exhibits in evidence, and the report of the referee.

(m) Plea of Guilty by Respondent . At any time during the progress of disciplinary proceedings, a respondent may tender a plea of guilty.

(1) Before Filing of Complaint. If the plea is tendered before filing of a complaint by staff counsel, such plea shall be tendered in writing to the grievance committee or bar counsel.

(2) After Filing of Complaint. If the complaint has been filed against the respondent, the respondent may enter a plea of guilty thereto by filing the same in writing with the refereė to whom the cause has been assigned for trial. Such referee shall take such testimony thereto as may be advised, following which the referee will enter a report as otherwise provided.

(3) Unconditional. An unconditional plea of guilty shall not preclude review as to disciplinary measures imposed.

(4) Procedure . Except as herein provided, all procedure in relation to disposition of the cause on pleas of guilty shall be as elsewhere provided in these rules.

(n) Cost of Review or Reproduction .

(1) The charge for reproduction, when photocopying or other reproduction is performed by the bar, for the purposes of these rules shall be as determined and published annually

by the executive director. In addition to reproduction charges, the bar may charge a reasonable fee incident to a request to review disciplinary records or for research into the records of disciplinary proceedings and identification of documents to be reproduced.

(2) When the bar is requested to reproduce documents that are voluminous or is requested to produce transcripts in the possession of the bar, the bar may decline to reproduce the documents in the offices of the bar and shall inform the requesting person of the following options:

(A) purchase of the transcripts from the court reporter service that produced them;

(B) purchase of the documents from the third party from whom the bar received them; or

(C) designation of a commercial photocopy service to which the bar shall deliver the original documents to be copied, at the requesting party's expense, provided the photocopy service agrees to preserve and return the original documents and not to release them to any person without the bar's consent.

(o) Costs .

(1) Taxable Costs. Taxable costs of the proceedings shall include only:

(A) investigative costs, including travel and out-of-pocket expenses;

(B) court reporters' fees;

(C) copy costs;

(D) telephone charges;

(E) fees for translation services;

(F) witness expenses, including travel and out-of-pocket expenses;

(G) travel and out-of-pocket expenses of the referee;

(H) travel and out-of-pocket expenses of counsel in the proceedings, including of the respondent if acting as counsel; and

(I) an administrative fee in the amount of $750 when costs are assessed in favor of the bar.

(2) Discretion of Referee. The referee shall have discretion to award costs and, absent an abuse of discretion, the referee's award shall not be reversed.

(3) Assessment of Bar Costs. When the bar is successful, in whole or in part, the referee may assess the bar's costs against the respondent unless it is shown that the costs of the bar were unnecessary, excessive, or improperly authenticated.

(4) Assessment of Respondent's Costs. When the bar is unsuccessful in the prosecution of a particular matter, the referee may assess the respondent's costs against the bar in the event that there was no justiciable issue of either law or fact raised by the bar.
Court Comment

A comprehensive referee's report under subdivision (k) is beneficial to a reviewing court so that the court need not make assumptions about the referee's intent or return the report to the referee for clarification. The referee's report should list and address each issue in the case and cite to available authority for the referee's recommendations concerning guilt and discipline.

Appendix H
Rule 4-1.7, Rules of Professional Conduct, Rules Regulating The Florida Bar: Conflict Of Interest; General Rule

(a) Representing Adverse Interests. A lawyer shall not represent a client if the representation of that client will be directly adverse to the interests of another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the lawyer's responsibilities to and relationship with the other client; and

(2) each client consents after consultation.

(b) Duty to Avoid Limitation on Independent Professional Judgment. A lawyer shall not represent a client if the lawyer's exercise of independent professional judgment in the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person or by the lawyer's own interest, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation.

(c) Explanation to Clients. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

(d) Lawyers Related by Blood or Marriage. A lawyer related to another lawyer as parent, child, sibling, or spouse shall not represent a client in a representation directly adverse to a

person who the lawyer knows is represented by the other lawyer except upon consent by the client after consultation regarding the relationship.

(e) Representation of insureds. Upon undertaking the representation of an insured client at the expense of the insurer, a lawyer has a duty to ascertain whether the lawyer will be representing both the insurer and the insured as clients, or only the insured, and to inform both the insured and the insurer regarding the scope of the representation. All other Rules Regulating The Florida Bar related to conflicts of interest apply to the representation as they would in any other situation.

Comment

Loyalty to a client

Loyalty is an essential element in the lawyer's relationship to a client. An impermissible conflict of interest may exist before representation is undertaken, in which event the representation should be declined. If such a conflict arises after representation has been undertaken, the lawyer should withdraw from the representation. See rule 4-1.16. Where more than 1 client is involved and the lawyer withdraws because a conflict arises after representation, whether the lawyer may continue to represent any of the clients is determined by rule 4-1.9. See also rule 4-2.2(c). As to whether a client-lawyer relationship exists or, having once been established, is continuing, see comment to rule 4-1.3 and scope.

As a general proposition, loyalty to a client prohibits undertaking representation directly adverse to that client's or another client's interests without the affected client's consent. Subdivision (a) expresses that general rule. Thus, a lawyer

ordinarily may not act as advocate against a person the lawyer represents in some other matter, even if it is wholly unrelated. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only generally adverse, such as competing economic enterprises, does not require consent of the respective clients. Subdivision (a) applies only when the representation of 1 client would be directly adverse to the other and where the lawyer's responsibilities of loyalty and confidentiality of the other client might be compromised.

Loyalty to a client is also impaired when a lawyer cannot consider, recommend, or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the client. Subdivision (b) addresses such situations. A possible conflict does not itself preclude the representation. The critical questions are the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client. Consideration should be given to whether the client wishes to accommodate the other interest involved.

Consultation and consent

A client may consent to representation notwithstanding a conflict. However, as indicated in subdivision (a)(1) with respect to representation directly adverse to a client and subdivision (b)(1) with respect to material limitations on representation of a client, when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the

basis of the client's consent. When more than 1 client is involved, the question of conflict must be resolved as to each client. Moreover, there may be circumstances where it is impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and 1 of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent.

Lawyer's interests

The lawyer's own interests should not be permitted to have adverse effect on representation of a client. For example, a lawyer's need for income should not lead the lawyer to undertake matters that cannot be handled competently and at a reasonable fee. See rules 4-1.1 and 4-1.5. If the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. A lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed interest.

Conflicts in litigation

Subdivision (a) prohibits representation of opposing parties in litigation. Simultaneous representation of parties whose interests in litigation may conflict, such as co-plaintiffs or co-defendants, is governed by subdivisions (b) and (c). An impermissible conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party, or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in

criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than 1 co-defendant. On the other hand, common representation of persons having similar interests is proper if the risk of adverse effect is minimal and the requirements of subdivision (b) are met. Compare rule 4-2.2 involving intermediation between clients.

Ordinarily, a lawyer may not act as advocate against a client the lawyer represents in some other matter, even if the other matter is wholly unrelated. However, there are circumstances in which a lawyer may act as advocate against a client. For example, a lawyer representing an enterprise with diverse operations may accept employment as an advocate against the enterprise in an unrelated matter if doing so will not adversely affect the lawyer's relationship with the enterprise or conduct of the suit and if both clients consent upon consultation. By the same token, government lawyers in some circumstances may represent government employees in proceedings in which a government agency is the opposing party. The propriety of concurrent representation can depend on the nature of the litigation. For example, a suit charging fraud entails conflict to a degree not involved in a suit for a declaratory judgment concerning statutory interpretation.

A lawyer may represent parties having antagonistic positions on a legal question that has arisen in different cases, unless representation of either client would be adversely affected. Thus, it is ordinarily not improper to assert such positions in cases pending in different trial courts, but it may be improper to do so in cases pending at the same time in an appellate court.

Interest of person paying for a lawyer's service

A lawyer may be paid from a source other than the client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty to the client. See rule 4-1.8(f). For example, when an insurer and its insured have conflicting interests in a matter arising from a liability insurance agreement and the insurer is required to provide special counsel for the insured, the arrangement should assure the special counsel's professional independence. So also, when a corporation and its directors or employees are involved in a controversy in which they have conflicting interests, the corporation may provide funds for separate legal representation of the directors or employees, if the clients consent after consultation and the arrangement ensures the lawyer's professional independence.

Other conflict situations

Conflicts of interest in contexts other than litigation sometimes may be difficult to assess. Relevant factors in determining whether there is potential for adverse effect include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that actual conflict will arise, and the likely prejudice to the client from the conflict if it does arise. The question is often one of proximity and degree.

For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference of interest among them.

Conflict questions may also arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may arise. In estate administration the identity of the client may be unclear under the law of some jurisdictions. In Florida, the personal representative is the client rather than the estate or the beneficiaries. The lawyer should make clear the relationship to the parties involved.

A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the 2 roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board, and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director.
Conflict charged by an opposing party

Resolving questions of conflict of interest is primarily the responsibility of the lawyer undertaking the representation. In litigation, a court may raise the question when there is reason to infer that the lawyer has neglected the responsibility. In a criminal case, inquiry by the court is generally required when a lawyer represents multiple defendants. Where the conflict is such as clearly to call in question the fair or efficient administration of justice, opposing counsel may properly raise the question. Such an objection should be viewed with caution, however, for it can be misused as a technique of harassment. See scope.

Family relationships between lawyers

Rule 4-1.7(d) applies to related lawyers who are in different firms. Related lawyers in the same firm are also governed by rules 4-1.9 and 4-1.10. The disqualification stated in rule 4-1.7(d) is personal and is not imputed to members of firms with whom the lawyers are associated.

Representation of Insureds

The unique tripartite relationship of insured, insurer, and lawyer can lead to ambiguity as to whom a lawyer represents. In a particular case, the lawyer may represent only the insured, with the insurer having the status of a non-client third party payor of the lawyer's fees. Alternatively, the lawyer may represent both as dual clients, in the absence of a disqualifying conflict of interest, upon compliance with applicable rules. Establishing clarity as to the role of the lawyer at the inception of the representation avoids misunderstanding that may ethically compromise the lawyer. This is a general duty of every lawyer undertaking representation of a client, which is made specific in this context due to the desire to minimize confusion and inconsistent expectations that may arise.

Appendix I
Rule 4-1.13, Rules Of Professional Conduct, Rules Regulating The Florida Bar: Organization As Client

(a) Representation of Organization. A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) Violations by Officers or Employees of Organization. If a lawyer for an organization knows that an officer, employee, or other person associated with the organization is engaged in action, intends to act, or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization or a violation of law that reasonably might be imputed to the organization and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others:

(1) asking reconsideration of the matter;

(2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and

(3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.

(c) Resignation as Counsel for Organization. If, despite the lawyer's efforts in accordance with subdivision (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly a violation of law and is likely to result in substantial injury to the organization, the lawyer may resign in accordance with rule 4-1.16.

(d) Identification of Client. In dealing with an organization's directors, officers, employees, members, shareholders, or other constituents, a lawyer shall explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(e) Representing Directors, Officers, Employees, Members, Shareholders, or Other Constituents of Organization. A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders, or other constituents, subject to the provisions of rule 4-1.7. If the organization's consent to the dual representation is required by rule 4-1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

Comment

The entity as the client

An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, sharehold-

ers, and other constituents. Officers, directors, employees, and shareholders are the constituents of the corporate organizational client. The duties defined in this comment apply equally to unincorporated associations. "Other constituents" as used in this comment means the positions equivalent to officers, directors, employees, and shareholders held by persons acting for organizational clients that are not corporations.

When 1 of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by rule 4-1.6. Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by rule 4-1.6. This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by rule 4-1.6.

When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. However, different considerations arise when the lawyer knows that the organization may be substantially injured by action of a constituent that is in violation of law. In such a circumstance, it may be reasonably necessary for the lawyer to ask the constituent to reconsider the matter. If that fails, or if the matter is of sufficient seriousness and importance to the organization, it may

be reasonably necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. Clear justification should exist for seeking review over the head of the constituent normally responsible for it. The stated policy of the organization may define circumstances and prescribe channels for such review, and a lawyer should encourage the formulation of such a policy. Even in the absence of organization policy, however, the lawyer may have an obligation to refer a matter to higher authority, depending on the seriousness of the matter and whether the constituent in question has apparent motives to act at variance with the organization's interest. Review by the chief executive officer or by the board of directors may be required when the matter is of importance commensurate with their authority. At some point it may be useful or essential to obtain an independent legal opinion.

In an extreme case, it may be reasonably necessary for the lawyer to refer the matter to the organization's highest authority. Ordinarily, that is the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions highest authority reposes elsewhere; for example, in the independent directors of a corporation.

Relation to other rules

The authority and responsibility provided in subdivision (b) are concurrent with the authority and responsibility provided in other rules. In particular, this rule does not limit or expand the lawyer's responsibility under rule 4-1.6, 4-1.8, 4-1.16, 4-3.3, or 4-4.1. If the lawyer's services are being used by an organization to further a crime or fraud by the organization, rule 4-1.2(d) can be applicable.

Government agency

The duty defined in this rule applies to governmental organizations. However, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful official act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. Therefore, defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context. Although in some circumstances the client may be a specific agency, it is generally the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the government as a whole may be the client for purposes of this rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. This rule does not limit that authority. See note on scope.

Clarifying the lawyer's role

There are times when the organization's interest may be or becomes adverse to those of 1 or more of its constituents. In such circumstances the lawyer should advise any constituent whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest that the lawyer cannot represent such constituent and that such person may wish to obtain independent representation. Care must be taken to assure that the constituent understands that, when there is such adversity of interest, the lawyer for the

organization cannot provide legal representation for that constituent and that discussions between the lawyer for the organization and the constituent may not be privileged.

Whether such a warning should be given by the lawyer for the organization to any constituent may turn on the facts of each case.

Dual representation

Subdivision (e) recognizes that a lawyer for an organization may also represent a principal officer or major shareholder.

Derivative actions

Under generally prevailing law, the shareholders or members of a corporation may bring suit to compel the directors to perform their legal obligations in the supervision of the organization. Members of unincorporated associations have essentially the same right. Such an action may be brought nominally by the organization, but usually is, in fact, a legal controversy over management of the organization.

The question can arise whether counsel for the organization may defend such an action. The proposition that the organization is the lawyer's client does not alone resolve the issue. Most derivative actions are a normal incident of an organization's affairs, to be defended by the organization's lawyer like any other suit. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with the board. In those circumstances, rule 4-1.7 governs who should represent the directors and the organization.

Representing related organizations

Consistent with the principle expressed in subdivision (a) of this rule, an attorney or law firm who represents or has represented a corporation (or other organization) ordinarily is not presumed to also represent, solely by virtue of representing or having represented the client, an organization (such as a corporate parent or subsidiary) that is affiliated with the client. There are exceptions to this general proposition, such as, for example, when an affiliate actually is the alter ego of the organizational client or when the client has revealed confidential information to an attorney with the reasonable expectation that the information would not be used adversely to the client's affiliate(s). Absent such an exception, an attorney or law firm is not ethically precluded from undertaking representations adverse to affiliates of an existing or former client.

Appendix J
Canon Three
Code of Judicial Conduct

A Judge Shall Perform the Duties of Judicial Office Impartially and Diligently

A. Judicial Duties in General.

The judicial duties of a judge take precedence over all the judge's other activities. The judge's judicial duties include all the duties of the judge's office prescribed by law. In the performance of these duties, the specific standards set forth in the following sections apply.

B. Adjudicative Responsibilities.

(1) A judge shall hear and decide matters assigned to the judge except those in which disqualification is required.

(2) A judge shall be faithful to the law and maintain professional competence in it. A judge shall not be swayed by partisan interests, public clamor, or fear of criticism.

(3) A judge shall require order and decorum in proceedings before the judge.

(4) A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, and of staff, court officials, and others subject to the judge's direction and control.

(5) A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial

duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status, and shall not permit staff, court officials, and others subject to the judge's direction and control to do so. This section does not preclude the consideration of race, sex, religion, national origin, disability, age, sexual orientation, socioeconomic status, or other similar factors when they are issues in the proceeding.

(6) A judge shall require lawyers in proceedings before the judge to refrain from manifesting, by words, gestures, or other conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status, against parties, witnesses, counsel, or others. This Section 3B(6) does not preclude legitimate advocacy when race, sex, religion, national origin, disability, age, sexual orientation, socioeconomic status, or other similar factors are issues in the proceeding.

(7) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding except that:

(a) Where circumstances require, ex parte communications for scheduling, administrative purposes, or emergencies that do not deal with substantive matters or issues on the merits are authorized, provided:

(i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and

(ii) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication and allows an opportunity to respond.

(b) A judge may obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice and affords the parties reasonable opportunity to respond.

(c) A judge may consult with other judges or with court personnel whose function is to aid the judge in carrying out the judge's adjudicative responsibilities.

(d) A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to mediate or settle matters pending before the judge.

(e) A judge may initiate or consider any ex parte communications when expressly authorized by law to do so.

(8) A judge shall dispose of all judicial matters promptly, efficiently, and fairly.

(9) A judge shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness or make any nonpublic comment that might substantially interfere with a fair trial or hearing. The judge shall require similar abstention on the part of court personnel subject to the judge's direction and control. This Section does

not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court. This Section does not apply to proceedings in which the judge is a litigant in a personal capacity.

(10) A judge shall not commend or criticize jurors for their verdict other than in a court order or opinion in a proceeding, but may express appreciation to jurors for their service to the judicial system and the community.

(11) A judge shall not disclose or use, for any purpose unrelated to judicial duties, nonpublic information acquired in a judicial capacity.

C. Administrative Responsibilities.

(1) A judge shall diligently discharge the judge's administrative responsibilities without bias or prejudice and maintain professional competence in judicial administration, and should cooperate with other judges and court officials in the administration of court business.

(2) A judge shall require staff, court officials, and others subject to the judge's direction and control to observe the standards of fidelity and diligence that apply to the judge and to refrain from manifesting bias or prejudice in the performance of their official duties.

(3) A judge with supervisory authority for the judicial performance of other judges shall take reasonable measures to assure the prompt disposition of matters before them and the proper performance of their other judicial responsibilities.

(4) A judge shall not make unnecessary appointments. A judge shall exercise the power of appointment impartially and on the basis of merit. A judge shall avoid nepotism and favoritism. A judge shall not approve compensation of appointees beyond the fair value of services rendered.

D. Disciplinary Responsibilities.

(1) A judge who receives information or has actual knowledge that substantial likelihood exists that another judge has committed a violation of this Code shall take appropriate action.

(2) A judge who receives information or has actual knowledge that substantial likelihood exists that a lawyer has committed a violation of the Rules Regulating The Florida Bar shall take appropriate action.

(3) Acts of a judge, in the discharge of disciplinary responsibilities, required or permitted by Sections 3D(1) and 3D(2) are part of a judge's judicial duties and shall be absolutely privileged, and no civil action predicated thereon may be instituted against the judge.

E. Disqualification.

(1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

(a) the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) the judge served as a lawyer or was the lower court judge in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge has been a material witness concerning it;

(c) the judge knows that he or she individually or as a fiduciary, or the judge's spouse, parent, or child wherever residing, or any other member of the judge's family residing in the judge's household has an economic interest in the subject matter in controversy or in a party to the proceeding or has any other more than de minimis interest that could be substantially affected by the proceeding;

(d) the judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) is acting as a lawyer in the proceeding;

(iii) is known by the judge to have a more than de minimus interest that could be substantially affected by the proceeding;

(iv) is to the judge's knowledge likely to be a material witness in the proceeding.

(2) A judge should keep informed about the judge's personal and fiduciary economic interests, and make a reasonable effort to keep informed about the economic interests of the judge's spouse and minor children residing in the judge's household.

F. Remittal of Disqualification.

A judge disqualified by the terms of Section 3E may disclose on the record the basis of the judge's disqualification and may ask the parties and their lawyers to consider, out of the presence of the judge, whether to waive disqualification. If following disclosure of any basis for disqualification other than personal bias or prejudice concerning a party, the parties and lawyers, without participation by the judge, all agree the judge should not be disqualified, and the judge is then willing to participate, the judge may participate in the proceeding. The agreement shall be incorporated in the record of the proceeding.

COMMENTARY

Canon 3B(4) . The duty to hear all proceedings fairly and with patience is not inconsistent with the duty to dispose promptly of the business of the court. Judges can be efficient and business-like while being patient and deliberate.

Canon 3B(5). A judge must refrain from speech, gestures or other conduct that could reasonably be perceived as sexual harassment and must require the same standard of conduct of others subject to the judge's direction and control.

A judge must perform judicial duties impartially and fairly. A judge who manifests bias on any basis in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute. Facial expression and body language, in addition to oral communication, can give to parties or lawyers in the proceeding, jurors, the media and others an

appearance of judicial bias. A judge must be alert to avoid behavior that may be perceived as prejudicial.

Canon 3B(7). The proscription against communications concerning a proceeding includes communications from lawyers, law teachers, and other persons who are not participants in the proceeding, except to the limited extent permitted.

To the extent reasonably possible, all parties or their lawyers shall be included in communications with a judge.

Whenever presence of a party or notice to a party is required by Section 3B(7), it is the party's lawyer, or if the party is unrepresented, the party who is to be present or to whom notice is to be given.

An appropriate and often desirable procedure for a court to obtain the advice of a disinterested expert on legal issues is to invite the expert to file a brief as amicus curiae.

Certain ex parte communication is approved by Section 3B(7) to facilitate scheduling and other administrative purposes and to accommodate emergencies. In general, however, a judge must discourage ex parte communication and allow it only if all the criteria stated in Section 3B(7) are clearly met. A judge must disclose to all parties all ex parte communications described in Sections 3B(7)(a) and 3B(7)(b) regarding a proceeding pending or impending before the judge.

A judge must not independently investigate facts in a case and must consider only the evidence presented.

A judge may request a party to submit proposed findings of fact and conclusions of law, so long as the other parties are apprised of the request and are given an opportunity to respond to the proposed findings and conclusions.

A judge must make reasonable efforts, including the provision of appropriate supervision, to ensure that Section 3B(7) is not violated through law clerks or other personnel on the judge's staff.

If communication between the trial judge and the appellate court with respect to a proceeding is permitted, a copy of any written communication or the substance of any oral communication should be provided to all parties.

Canon 3B(8). In disposing of matters promptly, efficiently, and fairly, a judge must demonstrate due regard for the rights of the parties to be heard and to have issues resolved without unnecessary cost or delay. Containing costs while preserving fundamental rights of parties also protects the interests of witnesses and the general public. A judge should monitor and supervise cases so as to reduce or eliminate dilatory practices, avoidable delays, and unnecessary costs. A judge should encourage and seek to facilitate settlement, but parties should not feel coerced into surrendering the right to have their controversy resolved by the courts.

Prompt disposition of the court's business requires a judge to devote adequate time to judicial duties, to be punctual in attending court and expeditious in determining matters under submission, and to insist that court officials, litigants, and their lawyers cooperate with the judge to that end.

Canon 3B(9). The requirement that judges abstain from public comment regarding a pending or impending proceed-

ing continues during any appellate process and until final disposition. This Section does not prohibit a judge from commenting on proceedings in which the judge is a litigant in a personal capacity, but in cases such as a writ of mandamus where the judge is a litigant in an official capacity, the judge must not comment publicly. The conduct of lawyers relating to trial publicity is governed by Rule 4-3.6 of the Rules Regulating The Florida Bar.

Canon 3B(10). Commending or criticizing jurors for their verdict may imply a judicial expectation in future cases and may impair a juror's ability to be fair and impartial in a subsequent case.

Canon 3C(4). Appointees of a judge include assigned counsel, officials such as referees, commissioners, special masters, receivers, mediators, arbitrators, and guardians and personnel such as clerks, secretaries, and bailiffs. Consent by the parties to an appointment or an award of compensation does not relieve the judge of the obligation prescribed by Section 3C(4). See also Fla.Stat. § 112.3135 (1991).

Canon 3D. Appropriate action may include direct communication with the judge or lawyer who has committed the violation, other direct action if available, or reporting the violation to the appropriate authority or other agency. If the conduct is minor, the Canon allows a judge to address the problem solely by direct communication with the offender. A judge having knowledge, however, that another judge has committed a violation of this Code that raises a substantial question as to that other judge's fitness for office or has knowledge that a lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, is required under this Canon to in-

form the appropriate authority. While worded differently, this Code provision has the identical purpose as the related Model Code provisions.

Canon 3E(1). Under this rule, a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless of whether any of the specific rules in Section 3E(1) apply. For example, if a judge were in the process of negotiating for employment with a law firm, the judge would be disqualified from any matters in which that law firm appeared, unless the disqualification was waived by the parties after disclosure by the judge.

A judge should disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification. The fact that the judge conveys this information does not automatically require the judge to be disqualified upon a request by either party, but the issue should be resolved on a case-by-case basis. Similarly, if a lawyer or party has previously filed a complaint against the judge with the Judicial Qualifications Commission, that the fact does not automatically require disqualification of the judge. Such disqualification should be on a case-by-case basis.

By decisional law, the rule of necessity may override the rule of disqualification. For example, a judge might be required to participate in judicial review of a judicial salary statute, or might be the only judge available in a matter requiring immediate judicial action, such as a hearing on probable cause or a temporary restraining order. In the latter case, the judge must disclose on the record the basis for possible disqualification and use reasonable efforts to transfer the matter to another judge as soon as practicable.

Canon 3E(1)(b). A lawyer in a government agency does not ordinarily have an association with other lawyers employed by that agency within the meaning of Section 3E(1)(b); a judge formerly employed by a government agency, however, should disqualify himself or herself in a proceeding if the judge's impartiality might reasonably be questioned because of such association.

Canon 3E(1)(d). The fact that a lawyer in a proceeding is affiliated with a law firm with which a relative of the judge is affiliated does not of itself disqualify the judge. Under appropriate circumstances, the fact that "the judge's impartiality might reasonably be questioned" under Section 3E(1), or that the relative is known by the judge to have an interest in the law firm that could be "substantially affected by the outcome of the proceeding" under Section 3E(1)(d)(iii) may require the judge's disqualification.

Canon 3F. A remittal procedure provides the parties an opportunity to proceed without delay if they wish to waive the disqualification. To assure that consideration of the question of remittal is made independently of the judge, a judge must not solicit, seek, or hear comment on possible remittal or waiver of the disqualification unless the lawyers jointly propose remittal after consultation as provided in the rule. A party may act through counsel if counsel represents on the record that the party has been consulted and consents. As a practical matter, a judge may wish to have all parties and their lawyers sign the remittal agreement.

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